No. 17-269

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ROBERT W. FERGUSON
Attorney General
NOAH G. PURCELL
Solicitor General
Counsel of Record
FRONDA C. WOODS
Assistant Attorney General
JAY D. GECK
ANNE E. EGELER
Deputy Solicitors General
1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
noah.purcell@atg.wa.gov

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INTRODUCTION

Treaty interpretation should not start from a result and work backwards. There must be a principle in the treaty that requires the result and can be applied in future cases.

Respondents advanced such a principle for decades in this litigation and convinced the lower courts to adopt it: "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet.App. 94a. But Respondents now abandon that rule. In this Court, they start from the result—State culverts violate the Treaties—and offer several alternative theories to work backwards to that conclusion. The lower courts never endorsed these theories, and this Court should not adopt them in the first instance. Instead, it should answer the first question presented in the negative and vacate the Ninth Circuit's decision.

In any event, Respondents' alternative theories fail on the merits. While Respondents articulate the theories differently—highlighting that neither lower court adopted them—their proposals share common themes: the Treaties prohibit obstructions that "substantially degrade" the fishery. This claim lacks support in treaty text, history, and precedent, and would mean that dams the federal government built and licensed across the Northwest violate the Treaties.

Even if the Court found that one of these theories had merit, the proper result would be to remand, not affirm, because these theories fail to justify the rulings below. What counts as an "obstruction" and as "substantial degradation" are

crucial questions under these theories, questions nowhere answered in the lower court opinions. For example, the lower courts treated all State "barrier culverts" as violations, even though half are only partial barriers and allow fish passage. And Respondents' highest estimate of the number of fish affected by State culverts is a fraction of one percent of historic harvests. Is that substantial degradation? If this Court adopts one of Respondents' new theories, it should articulate the rule more clearly than they have and remand to the district court to apply it.

If the Court remands, it should also order consideration of the State's equitable defenses and require modification of the injunction, which orders far more than Respondents' new theories could justify.

ARGUMENT

A. Respondents Abandon the Principle Underlying the Decisions Below

Respondents disclaim the fundamental rationale for the rulings below, asserting that "the moderate-living standard . . . is not the basis of the Tribes' treaty claim here." Tribes' Br. 44. They portray the moderate-living test as a minor feature of the lower court rulings they never requested. U.S. Br. 35 ("[N]o party was requesting the guarantee of a 'moderate living.'"). This is inaccurate.

In the district court and the Ninth Circuit, Respondents repeatedly argued that "the right to earn a moderate living from fishing is constant as an essential element of the Treaty right as interpreted by the Supreme Court." U.S. CA9 Br. 19-20 n.3; *see also* U.S. CA9 Br. 20 ("[T]he Tribes are entitled under the

Treaties to an 'adequate supply of fish' so long as necessary to provide them with a moderate living."); Tribes' CA9 Br. 26 (arguing that the Treaties "reserve enough fish for tribes to live by fishing"); J.A. 54a ("The basis for the relief stated above is the State's duty, pursuant to the Stevens' Treaties, to refrain from impairing the tribes' ability to achieve a moderate living from their fisheries[.]"); J.A. 46a-47a, 62a-64a, 108a-09a, 120a (Respondents invoking moderate-living standard).

The Ninth Circuit based its decision on Respondents' moderate-living theory. It concluded that the treaty negotiators explicitly promised, and the Treaties implicitly promised, "that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Pet.App. 94a, 92a; *see also* Pet.App. 95a-96a ("Salmon now available for harvest are not sufficient to provide a 'moderate living' to the Tribes. . . . We therefore conclude that in building and maintaining barrier culverts . . . Washington has violated . . . the Treaties."). Respondents themselves acknowledged in opposing certiorari that a moderate-living guarantee was the foundation of the Ninth Circuit's holding, but argued that it created no conflict with precedent. *See, e.g.*, U.S. BIO 13 ("The [Ninth Circuit's] conclusion that petitioner violates the treaty fishing right by interfering with the Tribes' ability to ensure a moderate living does not conflict with . . . *Fishing Vessel*[.]"); Tribes' BIO 20 (arguing that "the Court of Appeals relied on the moderate living standard . . . to bound the State's obligation").

The district court's findings and judgment are also tied to this theory. It understood Respondents' claim as asserting "that the State has a treaty-based

duty to preserve fish runs so that the Tribes can earn a 'moderate living'." Pet.App. 250a. It rejected the State's critiques of the moderate-living standard, calling it a measure of the treaty right "created by the [Supreme] Court." Pet.App. 263a. It found that "[t]he Tribes are at present unable to harvest sufficient salmon to meet their needs and provide a livelihood," Pet.App. 158a, and suggested that *any* reduction from historic harvest levels would be a treaty violation, Pet.App. 175a (holding that "diminished harvests have harmed the Tribes," and "[i]t is not necessary that the Tribes quantify the amount of loss in order to demonstrate their entitlement to relief"). *See also* Pet.App. 256a, 271a.[1]

In short, the decisions below were premised on Respondents' claim that the Treaties entitle the Tribes to a minimum quantity of fish tied to their needs, a principle they now abandon. The Court should answer the first question presented in the negative and vacate the Ninth Circuit's opinion.

B. The Court Should Decline to Consider Respondents' Alternative Theories

Having abandoned the theory underlying the decisions below, Respondents ask this Court to affirm on an alternative theory. They offer several versions

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[1] The United States claims the district court "criticized the State" for suggesting that the Tribes' claim was based on a moderate-living standard. U.S. Br. 35 (citing Pet.App. 280a). But that ruling was issued by a different judge six years before the summary judgment ruling. Pet.App. 280a. The judge who granted summary judgment and the injunction characterized Respondents' claim as seeking a moderate-living right. Pet.App. 250a.

of the proposed theory, citing a range of new sources from the law of nations to the common law. The Court should decline their request based on the longstanding rule that this is "'a court of review, not of first view.'" *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

The Tribes offer several variations on their proposed treaty right. They first argue that culverts violate the Treaties for two independent reasons: (1) culverts obstruct salmon from reaching upstream places where tribes have a right to take fish; and (2) culverts cause a "substantial degradation of the fishery." Tribes' Br. 19-20. Later, they say "the relevant question is whether a particular type of activity significantly degrades the fishery to the point that it materially interferes with the Tribes' secured right of taking fish." Tribes' Br. 42. They then say that "if the Tribes were earning a moderate living from the fishery . . . the Tribes could not argue that the culverts had substantially degraded the fishery in violation of the Treaties." Tribes' Br. 45. The Tribes' theory extends beyond "obstructions," as they claim it also governs water rights. Tribes' Br. 41 n.7.

The United States sometimes asserts a narrower view, arguing that the Treaties prohibit only conduct that obstructs fish *and* substantially degrades the fishery. U.S. Br. 15 ("[T]he Stevens Treaties prohibit the State from imposing obstructions that substantially degrade or destroy the Tribes' traditional fisheries."), 20 (the Treaties prohibit "obstructions that would substantially degrade the resource"), 31 ("[T]he Tribes' right should be interpreted as including protection against

substantial depletion of their fisheries through imposition of impassable obstructions by the State."). But at other times, the United States suggests that the Treaties extend beyond preventing obstructions, and include a broader "right against substantial degradation of tribal fisheries." U.S. Br. 19. The United States never explains how either theory can be reconciled with its construction and licensing of dams throughout the Northwest that obstruct and substantially degrade tribal fisheries. *See, e.g., Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1020-21 & nn.2-5 (1983) (describing federal dams on the Columbia and Snake Rivers that decimated salmon runs).

It is thus unclear exactly what treaty right Respondents now claim. What is clear is that the rights they now assert were not the basis for the decisions below.

The Ninth Circuit never applied any sort of substantial-degradation test. No variation on the phrase "substantial degradation" appears anywhere in the Ninth Circuit's opinion or in Respondents' briefing to that court. (By contrast "moderate living" appears at least fifteen times in Respondents' Ninth Circuit briefing.)

The district court likewise never used the phrase "substantial degradation" or required Respondents to show that culverts had "substantially degraded" the fishery, instead finding it sufficient that "culverts are responsible for some portion of the diminishment." Pet.App. 256a. The court repeatedly emphasized that Respondents did not need to quantify the effect of State culverts, Pet.App. 256a, 175a ("It is

not necessary that the Tribes quantify the amount of loss . . . ."), and even held that "[t]he Court is not limited in granting relief to requiring that culverts identified as blocking fish passage be repaired," Pet.App. 174a. The district court did once use the phrase "significantly degrade" to describe the parties' understanding, Pet.App. 270a, but it never applied that standard, instead indicating that *any* diminishment from historic harvests would be a violation, Pet.App. 256a (describing the issue as whether the Treaties impose on "the State a duty to refrain from diminishing fish runs" by building culverts); Pet.App. 271 (holding that culverts violate the Treaties because they "diminish the number of fish that would otherwise be available for Tribal harvest"). Even Respondents describe the district court as "recogniz[ing] that the State's liability turns on whether the Treaties impose *any* obligation on the State not to block fish passage or otherwise degrade the fishery." Tribes' Br. 23. This was not a "substantial-degradation" test.

This Court ordinarily does "'not decide in the first instance issues not decided below.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1999)). Given that the lower courts never decided whether the Treaties create the rights Respondents now claim, this Court should decline to address these theories in the first instance and should reverse on the theory actually applied.

C. Even if the Court Considers and Accepts One of Respondents' Alternative Theories, It Should Remand, not Affirm

Even if Respondents' alternative theories had merit—which they do not, as detailed in Part D—they would not support affirming because they cannot justify the judgment and injunction. Thus, if the Court considers and accepts one of these theories, it should not affirm, but rather should articulate the rule clearly and remand for the district court to apply it.

Respondents contend that the judgment and injunction are supportable because "[t]he courts below properly concluded that the Stevens Treaties prohibit the State from imposing obstructions that substantially degrade or destroy the Tribes' traditional fisheries." U.S. Br. 15, 40; Tribes' Br. 39 ("This is a fish-blockage case . . . ."). Thus, even on Respondents' view, the judgment and injunction are supportable only if they prohibit "obstructions" that "substantially degrade" tribal fisheries. The judgment and injunction go vastly beyond that rule.

To begin with, many of the culverts that the district court deemed treaty violations would not even qualify as prohibited "obstructions" under the theories Respondents advance here. The district court treated all of the State's "barrier culverts" as treaty violations, using the State's definition of "barrier culverts." Pet.App. 159a, 236a-37a. But the State made a policy choice to define that term extremely broadly, and the State's definition does not align with Respondents' new theories in two crucial respects.

First, half of the "barrier culverts" that the district court deemed treaty violations are partial barriers and allow many fish to pass, only "imped[ing] fish of a certain size, for part of the year, or at certain stream flows." J.A. 381a. The State treats culverts as "barriers" even if they are 90% passable. J.A. 299a. While the State made the policy choice to categorize such culverts as "barriers," it makes no sense to define all partial barriers as "obstructions" and treaty violations. The Tribes themselves historically erected weirs that would qualify as "obstructions" under this theory because they blocked many salmon during parts of the year. J.A. 142a. The common law also allowed partial barriers to fish, even when it prohibited total barriers. *See, e.g.*, Joseph K. Angell, *A Treatise on the Law of Watercourses* 89 (1869) (explaining common law rule that generally prohibited downstream landowners from "*wholly* imped[ing] the passage of fish," and describing *Weld v. Hornby*, a leading case holding that a landowner created a nuisance by "convert[ing] a brush wear, through which *some* of the fish might and did escape, into a solid stone wear, which was entirely impervious" (emphases added)).

Second, the State identifies "barrier culverts" without regard to the location of usual and accustomed tribal fishing places. J.A. 297a-301a, 379a-82a. Thus, even if a state barrier totally prevents fish passage, there is no basis to assume that it obstructs fish from reaching a tribal fishing place. Respondents claim that "[m]any [state culverts] interpose a blockage between 'usual and accustomed' tribal fishing grounds and the ocean," Tribes' Br. 13, but they provide no citation for that claim or estimate

of how many, and the district court made no finding about how many State culverts block access to tribal fishing places. Respondents do include a picture that they say depicts a culvert blocking access to historic fishing places on the Nooksack River, Tribes' Br. 13, but there is no evidence that the picture depicts a *State* culvert, as opposed to a county, federal, or private culvert. (There is likewise no evidence that the culvert on page 12 of the Tribes' brief is the State's.)

Turning to "substantial degradation," neither Respondents nor the lower courts define this term (indeed, the lower courts never used it). Respondents suggest that "substantial degradation" means something close to "destruction." *E.g.*, U.S. Br. 37 (arguing that the State's acknowledgment of an anti-destruction rule "aligns with the decisions below and the position of the United States and the Tribes"); Tribes' Br. 48. But that is not remotely the standard applied by the district court, and its factual findings could not support a conclusion that State culverts "substantially degrade" the fishery under this standard or any reasonable definition.

Respondents' highest estimate of the impact of State culverts was that their removal "would result in an annual increase in production of 200,000 fish[.]" Pet.App. 255a. The district court never adopted this estimate or gave any numerical or percentage estimate of the effect State culverts have on tribal harvests. But even taking this estimate as true, it would make no sense to say that State culverts have destroyed or substantially degraded the fishery.

200,000 fish is less than 5% of recent harvest levels. J.A. 204a-05a. It is even smaller by historical

standards, when tens of millions of fish returned to Washington rivers annually. *See, e.g.*, J.A. 483a (39 million salmon caught in 1913 in Puget Sound alone). Many rivers in the case area historically produced far more than 200,000 fish *by themselves*. The Elwha, where the federal government recently removed two dams that had decimated salmon, is "believed to have produced nearly 400,000 spawning fish annually" before the dams. *Wild Fish Conservancy v. Nat'l Park Serv.*, 8 F. Supp. 3d 1289, 1292 (W.D. Wash. 2014); *see* J.A. 693a (Quinault River sockeye run "once numbered into a million"). If the cumulative effect of all State culverts is less than 5% of recent harvests, less than 1% of historic populations, and a fraction of what was previously produced by individual rivers, there is no plausible way to call their effect "destruction" or "substantial degradation."

To obscure this reality, Respondents rely on misleading and incomplete information. For example, Respondents emphasize the district court's findirg about the effects of barrier culverts on coho salmon in *tributaries* of the Skagit River, U.S. Br. 10, 51; Tribes' Br. 15, but they omit the rest of the finding, which estimates that barrier culverts caused only 6-13% of the total decline in the coho run in the Skagit River watershed. Pet.App. 161a. Even this estimate addressed the impact of *all* barrier culverts, not the effect of *State* barrier culverts. Pet.App. 161a; *see* J.A. 677a.

In sum, Respondents' new theories cannot justify the judgment and injunction. Indeed, the district court explicitly held that it was "not limited in granting relief to requiring that culverts identified as blocking fish passage be repaired." Pet.App. 174a.

Therefore, if the Court finds these theories compelling, it should clarify the exact rule imposed by the Treaties and remand to the district court for application. As Respondents now acknowledge, any such rule should require (at least) evidence that a State-owned culvert or series of culverts is substantially diminishing the number of salmon a tribe can take at its usual and accustomed fishing places. Tribes' Br. 42; U.S. Br. 31. Like the right to share fish recognized in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 671 (1979), any such analysis should proceed "on a river-by-river, run-by-run basis," not based on allegations about the effect of culverts regionwide. And if the Court bases this right on common-law principles, it should incorporate common law limitations on relief. *See infra* pp. 13-14.

D. Respondents' Alternative Theories Lack Merit in Any Event

Respondents' alternative theories not only fail to justify the judgment below, they also lack support in history, treaty language, and precedent. If the Court decides to deviate from its normal approach and consider them, it should reject them.

1. Respondents' Alternative Theories Are Unsupported by History and Understanding

Respondents argue extensively that the common law supports inferring a prohibition on obstructions that substantially degrade a fishery. This Court has already held that "the 'right of *taking* fish' . . . had no special meaning at common law" and has criticized using it to interpret the Stevens

Treaties, because there is no indication "that these concepts were understood by, or explained to, the Indians. Indeed, there is no evidence that Governor Stevens understood them . . . ." *Fishing Vessel*, 443 U.S. at 678, 677 n.23. But if the Court considers these concepts, it should consider them fully, not the one-sided picture Respondents present.

Respondents emphasize that the common law generally prohibited obstructing rivers so that no fish could pass. But this general rule was subject to two exceptions relevant here.

First, if the barrier "be in reality a public benefit, it shall not be considered as an obstruction, nor punishable as such[.]" Humphrey W. Woolrych, *A Treatise of the Law of Waters* 205 (1853); *id.* at 208 ("When a great public benefit ensued from that which occasioned the abridgement of the right of passage, such an abridgment was not a nuisance, but proper and beneficial[.]"). Thus, a road built to benefit the public—including the Tribes—is not automatically a nuisance under the common law.

Second, "it is everywhere agreed, that this common right is liable to be modified and controlled by the municipal law of the land[.]" 3 James Kent, *Commentaries on American Law* 413 (2d ed. 1832); Joseph K. Angell, *A Treatise on the Law of Watercourses* 87 (1869). Given that the State adopted laws authorizing construction of the highways and culverts, and was in turn implementing a federal highway-construction program, there could be no common law violation.

Respondents also point to an 1848 federal statute prohibiting obstruction of salmon-bearing

streams in the Oregon Territory. At most that demonstrates an understanding that the government would regulate fish passage, not an eternal rule prohibiting all obstructions.

This example highlights the double-edged nature of Respondents' argument. Respondents claim that "interference with fish passage has been actionable for centuries" under the common law. Tribes' Br. 21. But if that is accurate, why would the Treaties have needed to address fish passage? And why have the Tribes and federal government never previously challenged a State culvert under the common law or the theory that Treaties incorporate the common law?

Respondents' argument also ignores the most concrete historical counter-example to their position: dams. Respondents now claim that the treaty parties understood that any obstruction that would substantially degrade a fishery would violate the Treaties. Yet for decades starting in the early 1900s, the federal government built or licensed dams across the Northwest that would have failed this test.[2] Today these dams provide most of the electricity in Washington, Oregon, and Idaho,[3] and irrigate thousands of farms in arid areas.[4]

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[2] *See, e.g.*, *Idaho ex rel. Evans*, 462 U.S. at 1020-21 & nn. 2-5; *City of Tacoma v. FERC*, 460 F.3d 53, 61-62 (D.C. Cir. 2006) (describing "devastating drop in the fish populations" caused by federally-licensed dam).

[3] https://www.eia.gov/state/?sid=WA; https://www.eia.gov/state/?sid=ID; https://www.eia.gov/state/?sid=OR.

[4] https://www.usbr.gov/projects/pdf.php?id=219.

Respondents suggest in footnotes that the dams "shed no light on the interpretive question" here because they were built or licensed after the Treaties were signed. U.S. Br. 40 n.2; Tribes' Br. 47 n.9. But they were built or licensed *by the federal government* while it was actively enforcing the Treaties in court. State's Opening Br. 36 (citing cases). They are thus strong evidence that the "practical construction adopted by the parties" did not impose the unwritten prohibition Respondents now claim. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). If Northwest dams were contrary to the parties' understanding and to common law, it is remarkable that Respondents have cited no case saying so. And the significant consequences that would flow from ignoring this history and adopting a rule that would render the dams treaty violations should give the Court pause.

Ultimately, Respondents seek to escape the district court's accurate conclusion that the parties did not intend "to write any protection for the [fish] into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." Pet.App. 269a. They cannot.

2. Respondents' Alternative Theories Are Unsupported by Treaty Text

Respondents offer three textual hooks for their alternative theories that the "right of taking fish" implicitly prohibits obstructions that substantially degrade fisheries. None is persuasive.

First, Respondents argue that because the Treaties "secure" the Tribes' fishing rights, they "preserved the Tribes' pre-existing 'right of taking

fish.'" U.S. Br. 23; Tribes' Br. 25. But that pre-existing right did not include a right to any minimum quantity of fish. Salmon harvests varied from year to year, and low harvests sometimes "caused near starvation." *United States v. Washington*, 384 F. Supp. 312, 351 (W.D. Wash. 1974). It also did not include a right to bar all obstructions, as tribes regularly erected weirs. J.A. 142a. And there is no indication, in the common law or elsewhere, that it would have included a right to prohibit obstructions built for a public purpose or with government approval, as detailed above. While the Treaties guaranteed important rights, they did not guarantee that the Tribes would always be able to fish in the same manner and to the same extent that they had historically. *See, e.g.*, State's Opening Br. 30-39; *Fishing Vessel*, 443 U.S. at 685, 670 (holding that Tribes are entitled to "a fair share of the *available* fish," rather than adopting Tribes' proposed rule that "the treaties had reserved a pre-existing right to as many fish as their commercial and subsistence needs dictated") (emphasis added); *Puyallup Tribe v. Dep't of Game of Washington*, 391 U.S. 392, 398 (1968) (holding that the Treaties did not guarantee "the manner in which the fishing may be done," and that the State could regulate "the size of the take" for conservation purposes).

Second, Respondents claim that the right of "taking" fish "preserved the Tribes' ability to actually harvest fish[.]" Tribes' Br. 26. But the Tribes are taking millions of fish annually regardless of the State's culverts. J.A. 247a. And as just explained, the Treaties did not guarantee a particular harvest level.

Finally, Respondents argue that the right of taking fish extends to "all" of the Tribes' historical fishing places, so they must be able to "take" fish at all of them. Tribes' Br. 26. But even if that is accurate, Respondents have not identified specific historic fishing places where State culverts prevent them from taking fish.

3. Respondents' Alternative Theories Are Unsupported by Precedent

Respondents argue that *United States v. Winans*, 198 U.S. 371 (1905), and *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977) (*Puyallup III*), support their alternative theories. Not so.

Winans involved a landowner who blocked Indians from entering his land to fish, even though it was a usual and accustomed fishing place, and who installed a "fish wheel" that caught all of the fish. *Winans*, 198 U.S. at 379-80. In enjoining this conduct, this Court applied two Treaty rights that are now well-settled: a tribal right of access to usual and accustomed fishing places, and a tribal right "to take a share of each run of fish that passes through tribal fishing areas." *Fishing Vessel*, 443 U.S. at 679; *see also id.* at 681 (explaining that *Winans* "assured the Indians a share of the fish"). Respondents claim that *Winans* established a different right: a right against "water-based obstructions." Tribes' Br. 28. But no language in *Winans* expresses such a right.

The Tribes point out that *Puyallup III* held that the State could regulate tribal fishing even within a reservation so that the tribe could not "completely destroy" the Puyallup River fishery and to protect

the non-Indians' right to a share of the fish run. Tribes' Br. 33. But nothing in the Court's language addressed obstructions or "substantial degradation." The recognition of a right to share the salmon runs and of power to prevent their destruction simply presaged application of the same principles in *Fishing Vessel*, 443 U.S. at 683 ("*Puyallup III* also made it clear that the *Indians* could not rely on their treaty right to exclude others from access to certain fishing sites to deprive other citizens of the State of a 'fair apportionment' of the runs.").

In short, no prior case adopts the theory Respondents propose here.

E. The Treaty-Based Protections the State Recognizes Differ Dramatically from Respondents' Alternative Theories

Respondents seek to minimize the novelty of their alternative theories by claiming they are identical to the State's recognition that no one can destroy the fisheries. U.S. Br. 37; Tribes' Br. 46-48. This is inaccurate.

The State has acknowledged two treaty-based protections for salmon, in addition to the many state and federal laws that protect salmon and the State's own strong incentives to protect salmon. Unlike Respondents' theories, both are narrow and grounded in precedent.

First, the State has acknowledged what *Fishing Vessel* said: that a court overseeing salmon allocation can "enjoin those who would interfere with" the res. *Fishing Vessel*, 443 U.S. at 692 n.32. This narrow power allows a court to enjoin acts that

threaten a salmon run with extinction, as in *United States v. Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981), when the Ninth Circuit enjoined a tribe from fishing one run during a year in which "precariously low numbers of that salmon were" returning and "the safe passage of every salmon was necessary to preserve the species." But Respondents have not alleged and could not plausibly allege that State culverts meet this standard.

Second, the State has acknowledged what this Court held in the *Puyallup* cases: State regulation cannot discriminate against the Tribes. As the Ninth Circuit explained in a later-vacated opinion in this case: "Reckless or malicious disregard for the effects of State projects on the fishery, leading to drastic decline in the available fish, very likely would be barred under the 'discriminatory regulation' standard of *Puyallup I*." *United States v. Washington*, 694 F.2d 1374, 1385 (9th Cir. 1982), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc). But here again, Respondents have not alleged that the State, in building culverts to federal design standards, acted with reckless or malicious disregard for the effects on fish. To the contrary, it was the State that first recognized—in the 1990's—that federal culvert designs could be inadequate for salmon. It was the State that voluntarily developed and adopted better designs for all projects going forward, and began the massive task of replacing old culverts. J.A. 101a, 315a-17a, 375a-78a, 385a-91a.

In short, the treaty-based protections the State acknowledges are far narrower than Respondents' theories, and could not justify affirmance here.

F. If the Court Orders Further Proceedings on Respondents' Alternative Theories, It Should Also Order Consideration of the State's Equitable Defenses

If the Court declines to reject Respondents' alternative theories outright, it should remand for consideration of the State's equitable defenses. Respondents defend the lower courts' dismissal of these defenses on three grounds. All fail.

First, Respondents ask this Court to apply case law prior to *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and hold that equitable defenses are categorically unavailable against the government when it asserts long-dormant treaty claims. In effect, Respondents ask this Court to conclude that the result in *Sherrill* would have been the opposite if the United States had supported the tribe as a party, rather than as amicus. Nothing in *Sherrill* supports that theory, and the Second Circuit has repeatedly applied *Sherrill* to bar claims brought by the federal government, explaining that *Sherrill*'s reasoning is not limited to claims brought by a tribe, "but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally." *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 278-79 (2d Cir. 2005); *see also Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010).

Moreover, unlike the pre-*Sherrill* cases Respondents cite, the State is not contending that actions of "individual government employees" bar the claims here. Tribes' Br. 49. Rather, Congress and federal agencies approved and encouraged the

building and design of these culverts. State's Opening Br. 17-18. Where, as here, a sovereign's claim is belatedly asserted, "longstanding observances and settled expectations are prime considerations," especially where the claim has "disruptive practical consequences" that "seriously burde[n] the administration of state and local governments." *Sherrill*, 544 U.S. at 218, 219, 220 (alteration in original).

Second, Respondents say it is unclear which equitable defenses the State "means to invoke." U.S. Br. 41. But the State has argued waiver since 2001. J.A. 86a-87a. Respondents now claim—for the first time—that waiver is not an equitable defense. U.S. Br. 41. If that is true, then the district court's justification for dismissing that defense—that equitable defenses are unavailable against the government—was clearly wrong, and remand is required. Pet.App. 274a-75a. Moreover, in *Sherrill* this Court considered the equitable defenses of laches, acquiescence, and impossibility even though they had not been briefed. *Sherrill*, 544 U.S. at 214 n.8. At the very least, the State should have been allowed to plead these defenses after *Sherrill*, but the district court refused the State's post-*Sherrill* request to reconsider its ruling on equitable defenses. *See* J.A. 7a.; Pet.App. 249a-72a.

Finally, Respondents argue that if the State is allowed to present its equitable defenses, they will fail. U.S. Br. 45-46. But the trial court dismissed the State's defenses at the pleading stage, which is appropriate only if the allegations are "unworthy of any consideration." 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 1380

(3d ed. 2013). The State supported its defenses with detailed allegations about a wide range of federal actions, J.A. 73a-86a, which must be taken as true. The Court should not permit Respondents' one-sided portrayal of the facts to predetermine the merits.

G. The Court Should At Least Remand the Overbroad Injunction

Even if this Court accepts Respondents' argument that the Treaties bar obstructions that "substantially degrade" a fishery, it should vacate the injunction, which is not remotely tailored to that standard.

As detailed above, the district court used the State's list of "barrier culverts" as the basis for the injunction. Pet.App. 159a, 236a-37a. But when the State identified its "barrier culverts," it did not apply a "substantially-degrades-a-tribal-fishery" test. The State never analyzed whether the culvert affected a tribal fishery at all, and it included culverts that allow up to 90% fish passage. J.A. 299a. The district court did not and could not have found that all of the culverts on the State's list are "obstructions" that substantially degrade a tribal fishery. Instead, the district court said explicitly that it was "not limited in granting relief to requiring that culverts identified as blocking fish passage be repaired." Pet.App. 174a. Thus, under Respondents' own alternative test, the district court's findings are a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996).

Respondents offer a number of responses to this inescapable conclusion. None succeeds.

Respondents first claim that the State cannot challenge the injunction because it declined to propose a different one. Tribes' Br. 17, 59; U.S. Br. 18, 48, 52. But the State proposed detailed findings and conclusions after the remedy trial and argued that no injunction was needed. J.A. 26a. Respondents cite no authority requiring a party to propose an injunction to be entitled to one that respects constitutional limits and equity. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (same).

Respondents next offer a series of meritless arguments to justify forcing the State to replace its barrier culverts even if no fish can reach them because of non-State barriers.

- They argue that "non-state barriers tend to be highly clustered upstream from state-owned barriers," but they cite only a single example. U.S. Br. 49 (citing J.A. 97a). In reality, there are hundreds of non-State barriers downstream from State barrier culverts. *See, e.g.*, J.A. 397a (showing that in a sample of 315 State culverts, there were 220 non-State barriers downstream). The map at J.A. 285a, recreated at the end of this brief, shows one of many examples.
- They argue that non-state barrier culverts are irrelevant because many allow partial fish passage. Tribes' Br. 56-57; U.S. Br. 14-15, 18, 49. But so do half of the State culverts the district court ordered

replaced. J.A. 381a; *see* J.A. 285a, 309a-10a. Respondents' concession that partial fish passage may preserve fisheries doesn't defend the injunction; it undermines it.

- They point out that the State sometimes replaces culverts even when there are other barriers on the stream. Tribes' Br. 57. But that State policy choice does not render such culverts violations of federal law that a court can order replaced.

- They say it is equitable to order the State to correct its barriers surrounded by non-State barriers because "hundreds of non-state barriers [are] being corrected each year." U.S. Br. 50. But the chart they cite says nothing about how many non-State barriers are being replaced; it lumps together State and non-State barriers. J.A. 633a. And as to non-State barriers, the State is funding much of that work. J.A. 274a-75a.

Finally, Respondents misleadingly suggest that a drastic injunction was needed because "the number of known barrier culverts had in fact *increased*" from 2009 to 2011, "as new barrier culverts were being built faster than existing ones were being corrected." U.S. Br. 11. In reality, the number of barrier culverts listed increased *not* because the State built more, but because the State reassessed its existing culverts and identified more as barriers. Pet.App. 163a ("new barrier culverts have in fact been *identified* since 2009") (emphasis added);

J.A. 225a-26a (describing reassessment). This is evidence of the State's conscientiousness, not intransigence.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General
NOAH G. PURCELL
Solicitor General
Counsel of Record
FRONDA C. WOODS
Assistant Attorney General
JAY D. GECK
ANNE E. EGELER
Deputy Solicitors General
1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
noah.purcell@atg.wa.gov

April 9, 2018

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